Supreme Court, U.S.
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No. 86-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

R. E. FRAVER; J. RIVES MANNING, JR.; J. C. FAUST; HUBERT HAMPTON MARTIN; WILLIAM A. PLEASANT; C. B. WEATHERLY, JR.; LEE WILLIAMS; JIMMY MCELREATH; MIKE STEINER; DAVID MARION; JAMES K. WRIGHT; WILLIAM A. DAVENPORT, JR.; MAX F. ROBERTS; TED BRIGHT; BILLY RAY STALEY; WILLIAM SAMUEL KIRBY; HERBERT M. SPEAS, JR.; ROBERT L. DOBBINS; LINDA G. HAMRICK; EDWARD L. LOWDER; RON WORTHINGTON; DAVID BREEDEN; PEGGY HORNEY; HARRY HORNEY; ROBERT G. WOMBLE,

Petitioners,

v.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.

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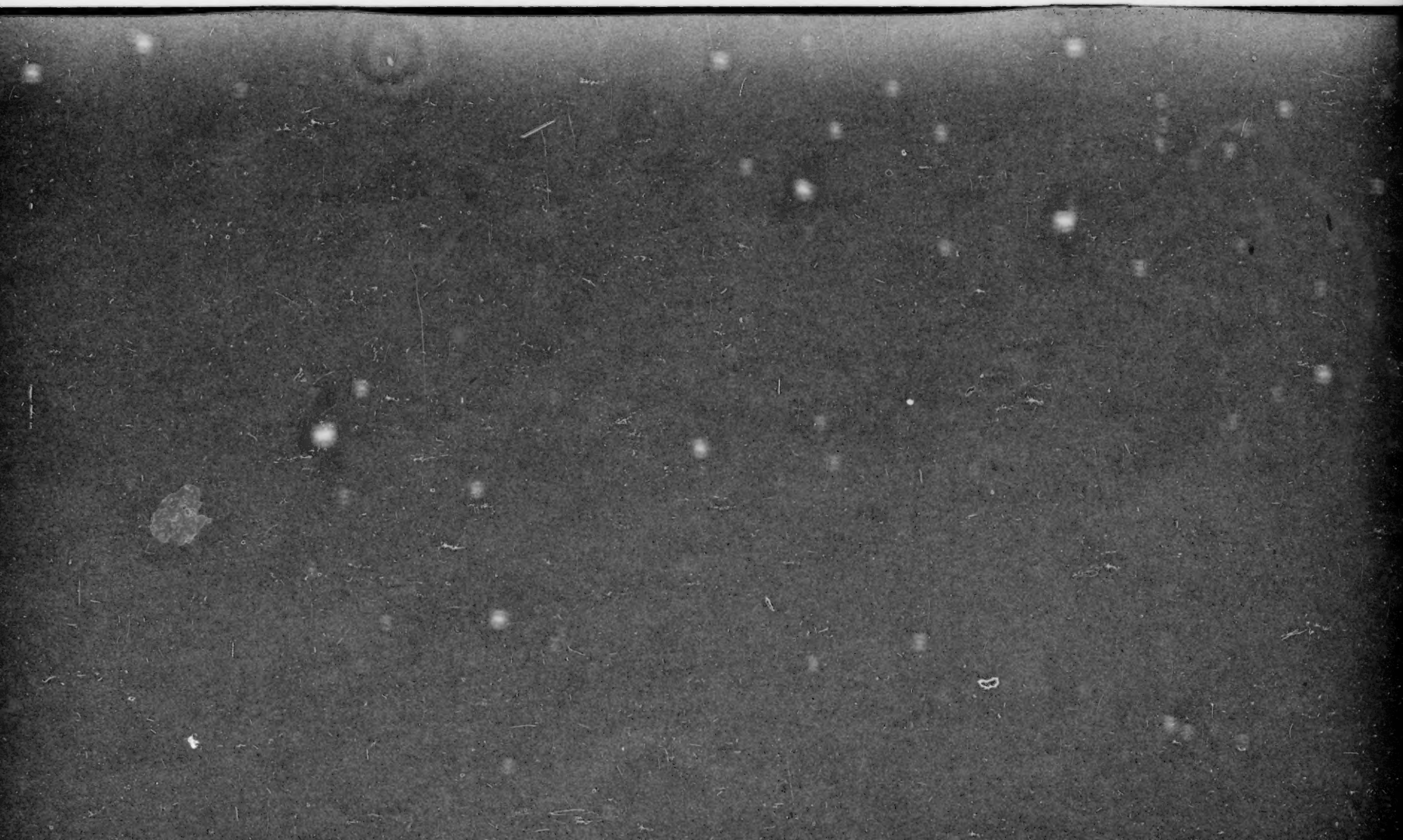

QUESTION PRESENTED

Whether the Fourth Circuit correctly determined that certain contractual provisions providing for a "buy-out" of a departing insurance agent's interest in business he leaves behind for his successor, which payments are recouped from said agent's successor, do not constitute a "pension plan" within the meaning of the Employee Retirement Income Security Act of 1974.

RULE 28.1 STATEMENT

North Carolina Farm Bureau Mutual Insurance Company, Inc., is a mutual insurance company organized under the laws of the State of North Carolina. As a mutual company, it is owned by its policyholders and there is no stock outstanding.

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OPINIONS BELOW

The opinion of the District Court is contained in three separate orders of that Court. The District Court initially granted summary judgment for the petitioners in an order dated June 22, 1984. (Pet. App. A-16 - A-

50).[1] The District Court then withdrew the judgment in this matter by an order altering and amending the judgment. After an evidentiary hearing, a final judgment was entered by the District Court on September 3, 1985. This opinion is reported at 643 F. Supp. 633 (E.D.N.C. 1985). (Pet. App. A-51 - A-110). The Court of Appeals issued an opinion reversing the District Court ruling and thereby ruling in favor of respondent. This opinion is reported at 801 F.2d 675 (4th Cir. 1986). (Pet. App. A-1 - A-15).

STATEMENT

This case concerns the right of respondent, North Carolina Farm Bureau Mutual Insurance Company, Inc. (hereinafter "Farm Bureau"), to cease making certain payments to petitioners, former members of its sales force, when they violated a condition precedent to payment. This identical contractual provision has been reviewed and upheld as a matter of State law by the North Carolina appellate courts in *Hudson v. North Carolina Farm Bureau Mutual Insurance Company*, 23 N.C. App. 501, 209 S.E. 2d 416 (1974), *cert. denied*, 286 N.C. 414, 211 S.E. 2d 802 (1975).

In this federal action the petitioners alleged that the condition precedent to payment was unenforceable under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (1982 and Supplemental II. 1984) (hereinafter "ERISA"). The pivotal issue before the Court of Appeals for the Fourth Circuit was whether the benefit provisions of the individual contracts established an employee pension benefit plan. Without reaching respondent's other arguments,[2] the Court of

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[1] References to the appendix to the petition are cited as "Pet. App."; references to the petition are cited as "Pet."; references to the appendix to this brief are cited as "Resp. App.".

[2] In particular the Fourth Circuit did not find it necessary to address the question of whether or not the petitioners were employees of Farm Bureau or independent contractors. Also, the

Appeals found that the contracts provided for "buy-out" payments to departing agents instead of retirement income, and thus did not come within the scope of ERISA.

Farm Bureau is a mutual company, meaning that it is owned by its policyholders and there is no stock outstanding. Farm Bureau has been in existence since 1953 and since that time has always marketed its insurance through independent contractors, such as the petitioners. The sales force is divided between agents and agency managers who each enter into either an agent's agreement or agency manager's agreement, containing provisions regarding the relationship between the agents or agency managers and Farm Bureau.

The agents and agency managers are paid through commissions, which are reported to the IRS on Forms 1099 and not W-2 forms. Farm Bureau does not withhold FICA or FUTA from the commissions. Farm Bureau has a funded pension plan that complies with ERISA for all its full time employees. The members of the sales force as independent contractors, do not participate in that plan.

The agents' and agency managers' contracts provide for a termination (1) at the end of the year that the agent or agency manager reaches age 65; or (2) by either party upon ten days' notice, without cause. Upon termination the agent or agency manager is entitled to certain payments based on the amount of commissions for a twelve-month period prior to termination. The contracts also provide that the termination payments

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Court of Appeals did not address the question of whether or not the petitioners were "highly compensated employees", and therefore not covered by the vesting requirements of ERISA, nor did it determine the proper vesting schedule to apply or determine if any of the petitioners' claims were barred by the statute of limitations.

shall be deducted from the commissions payable to the incoming agent who takes over for the outgoing agent. The limitation on the outgoing agent receiving these payments is that the outgoing agent shall not be licensed to sell nor shall he sell any kind of insurance in North Carolina anytime during the payment period. In other words, the outgoing agent shall not compete with the new incoming agent for the payment period. If the agent does, he or she loses the right to receive these termination payments.

Each of the petitioners is a former agent or agency manager for Farm Bureau who, during the payment period, became licensed to sell insurance with other companies in North Carolina and solicited sales in competition with Farm Bureau. Farm Bureau discontinued the termination payments.

The termination payment provisions in question were implemented by Farm Bureau in the early sixties, well prior to the adoption of ERISA. The purpose of the provisions was not to provide retirement benefits or to pay deferred compensation but rather was to compensate a departing agent or agency manager for the established business that he or she had generated and was leaving behind. In effect, a new or incoming agent or agency manager would "inherit" the existing business left behind by the outgoing agent or agency manager and would begin receiving commissions from this existing business. It was considered to be a normal industry practice for a person owning an agency to be able to sell his agency and the existing business. In an attempt to duplicate that situation, the contracts provided for a "buy-out" or "sale" of the existing business by the outgoing agent to the new agent or agency manager.

The money to be paid to the outgoing agent or agency manager pursuant to the contract provisions would be deducted from the commissions of the incoming agent

or agency manager. Farm Bureau served only as a conduit for these payments basically from the incoming agent or agency manager to the outgoing agent or agency manager. There was no fund or trust established for the payment of these benefits.

None of the petitioners actually "retired", all the petitioners went into the insurance business and directly competed with the new agent or agency manager taking their place in the individual county agency. In many cases the petitioners retained the file cards, copies of insurance contracts and other information directly generated by being associated with Farm Bureau, and this material was used to solicit former Farm Bureau policyholders in direct competition with the incoming agent or agency manager. None of the petitioners were 65 when they terminated their relationship with Farm Bureau, and the average age at the time of termination was 42 years.

ARGUMENT

THERE ARE NO "SPECIAL" OR "IMPORTANT" REASONS FOR THE COURT TO REVIEW THE FOURTH CIRCUIT'S INTERPRETATION OF THE SCOPE OF ERISA AS IT APPLIES TO THE SPECIFIC "BUY-OUT" PROVISIONS OF THESE CONTRACTS.

Petitioners contend that the Fourth Circuit Court of Appeals wrongly decided and applied the provisions of ERISA relating to coverage of a "buy-out" provision of an employment contract. Pet. 12-13. As we show below, there are no "special" or "important" reasons, as required by Supreme Court Rule 17.1, for this Court to grant certiorari to review the Fourth Circuit Court of Appeals' decision that these were contracts setting forth the particular relationship between these parties and that these provisions of the agents' and agency managers' agreements constituted "buy-out" and not retirement provisions within the scope of ERISA.

A. There Is No Conflict Among the Courts of Appeals on the Question of Whether a Contractual "Buy-Out" Provision Is a Pension Plan Within the Meaning of ERISA.

The Fourth Circuit Court of Appeals in the matter below has addressed the question of the application of ERISA to a very specific and narrow fact situation, that being the terms of agents' contracts containing the described "buy-out" provisions. This decision is not in conflict with any other decisions of Courts of Appeals or other Federal Courts.

The petitioners would have the Court believe that the Fourth Circuit's opinion conflicts with two Circuit Court opinions, namely, *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) and *Scott v. Gulf Oil*, 754 F.2d 1499 (9th Cir. 1985). However, even a cursory reading of these cases clearly indicates that the issues were not even remotely similar to those found in the case at hand and the principles enunciated in those cases have not been rejected or compromised by the Fourth Circuit's opinion.

The Courts in *Donovan* and *Scott* dealt with the question of whether the plaintiffs had alleged sufficiently the existence of "welfare benefit plans" under ERISA to invoke the jurisdiction of the Federal Courts. In both cases, the Courts were concerned with whether there might be a "welfare benefit plan" under ERISA, as opposed to a "pension benefit plan" that is the subject of this appeal.[3] Both cases accepted the preliminary requirement that the benefit sought was an "intended benefit" of a welfare benefit plan; in the case at bar the Fourth Circuit specifically found that the "buy-out" benefit was not a benefit covered under the pension benefit plan provisions of ERISA. Further, in neither

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[3] For reasons associated with vesting, the petitioners in this matter vigorously argued below that the contracts did not create a "welfare benefit plan".

Donovan nor *Scott* was there an individual contract situation nor was there a "buy-out" provision.

In *Donovan*, the question was whether there was federal subject matter jurisdiction under ERISA over the trustees of a multi-employer insurance trust such that they had fiduciary responsibilities pursuant to ERISA provisions relating to "employee welfare benefit plans". The Court determined that there was Federal Court jurisdiction over the matter.

Although the Court in *Donovan* predicated its decision from the initial principles that ERSIA does not require a formal written plan, the Court relied on the existence of an arrangement to provide benefits intended to be provided under "employee welfare benefit plans", 688 F.2d at 1373, at C, in holding that federal subject matter jurisdiction under ERISA had been sufficiently invoked. Because of the procedural posture of *Donovan*, the Court did not determine what plans may have been established or maintained or whether any particular defendant was a fiduciary to a plan.

The Court in *Scott* was faced with a question of what is an employee welfare benefit plan, as opposed to an employee pension benefit plan. The Court did not hold that there was a "plan" but rather held there were sufficient allegations, which if true, could give rise to a plan.

It is quite clear that these cases are not remotely factually similar to the case at hand. Although the two Circuit Courts do make broad statements relating to what is a "plan" for purposes of a welfare benefit plan, they only apply those principles to their particular fact situations, neither of which are similar to the circumstances in the case at hand and they only hold that minimally sufficient allegations have been pled in these cases. Clearly in this case, the Fourth Circuit examined the specific facts and concluded that there was no ERISA coverage based on the reasons stated in its opinion. The

Fourth Circuit did not reject any of the principles enunciated in *Donovan* and *Scott*, and the fact that the Fourth Circuit did not specifically cite those cases or review those principles simply does not indicate a conflict in the Court's holding.

Neither *Donovan* nor *Scott* involved a "buy-out" provision such as involved here nor did they address an "individual" contract situation. The case at bar merely presents an application of the statutory provisions of ERISA to a unique set of facts and does not raise important questions of Federal law requiring Supreme Court consideration.

B. The Alleged Conflict in the Case Law Within the Fourth Circuit Does Not Support a Grant of Certiorari.

The petitioners' initial contention as a basis for the Court to grant certiorari is what it terms a conflict between the decision in this case and the case of *Darden v. Nationwide Mutual Insurance Company, et al.*, 796 F.2d 701 (4th Cir. 1986). The petitioners termed the case as factually indistinguishable. This is simply not true.

The main emphasis in the *Darden* decision was the question of whether the plaintiff was an employee or an independent contractor. The District Court granted summary judgment on that issue for the defendant in *Darden*, before there had been any determination on the existence of an employee pension benefit plan under ERISA. Therefore, there is very little factual development by the Fourth Circuit of the circumstances in *Darden* that might relate to whether the provisions in question constitute a "plan" under ERISA. However, the facts that can be gleaned from the Fourth Circuit opinion show that there are significant differences between the circumstances in *Darden* and those in the case at bar.

Darden was an insurance agent with Nationwide, and as such was afforded benefits through a retirement and deferred compensation plan. Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from insurance premiums. There is no mention in the *Darden* case of there being any provisions relating to a "buy-out" or that the new incoming agent would be obligated to fund any of the retirement or deferred compensation payments.

In the *Darden* decision, the Fourth Circuit did not decide whether in fact there was a "plan" covered by ERISA. Rather, the Fourth Circuit analyzed whether there was a severance pay exception or whether the highly compensated employee exception applied to relieve the defendant of any obligation to pay the benefits. The Court of Appeals did not decide these issues but rather remanded the case to the District Court for further evidence on the question. 796 F.2d at 707-09. There is no final ruling on the question of whether or not the relevant provisions in *Darden* constituted a "plan" under ERISA.

Thus, there is clearly no conflict between *Darden* and the case at bar since the cases are factually distinguishable and the Court of Appeals did not decide the issue of whether a plan existed in the *Darden* case.

The Court of Appeals for the Fourth Circuit apparently agreed that there is no conflict in its decisions. The petitioners requested the Court of Appeals to reconsider its decision in the case at bar and also requested an *en banc* hearing. In its petition for rehearing, the petitioners specifically addressed the supposed conflict with the *Darden* case. The Fourth Circuit Court of Appeals denied the motion for rehearing and the suggestion for *en banc* rehearing. (Pet. App. A-111 - A-112). Since there was a request for *en banc* hearing, all the Judges

for the Fourth Circuit Court of Appeals had an opportunity to request such a hearing. No member of the Court requested a poll on the suggestion for rehearing *en banc*. Also, the panel that considered this case did not agree to rehear the matter.

It is further worth noting that Judge Sprouse sat on the panel in both the case at bar as well as the *Darden* case. Also, the cases were argued and considered by the Court of Appeals within a relatively short period of time of each other.[4] The Court of Appeals was aware of the petitioner's *Darden* case conflict argument and clearly rejected the same by its denial of petitioner's motion for rehearing and motion for *en banc* rehearing.

Finally, even if there did exist an intra-Circuit conflict, such would not be a basis for a grant of certiorari. The Circuit Courts should be left to their own means to correct any intra-Circuit conflict, and this Court has not seen fit to assume the role of correcting such conflicts. See *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Therefore, there is no conflict between the case at bar and the *Darden* case, and the Fourth Circuit has had ample opportunity to correct such conflict if it believed that any conflict did exist.

C. The Petition Does Not Present Any Other Reasons Requiring the Court To Review the Fourth Circuit Decision in this Case.

The petitioners' final basis for asking this Court to grant certiorari is simply their contention that the Fourth Circuit opinion is wrong. However, this is not a

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[4] *Darden* was argued before the Fourth Circuit Court of Appeals on December 3, 1985 and decided on July 15, 1986. The case at bar was argued before the Fourth Circuit Court of Appeals on April 9, 1986 and decided on September 18, 1986.

supportable basis for the Supreme Court to grant certiorari, and, in any event, the Fourth Circuit opinion is supported by both law and logic and is a proper application and interpretation of the statutory law.

The Fourth Circuit's opinion simply recognized the accepted principle that ERISA is not all encompassing and that there are circumstances that do not give rise to coverage under ERISA. The Fourth Circuit noted that even the Department of Labor recognizes the limitations on the coverage of ERISA by citing two Department of Labor opinion letters where the employment contract exception is approved and adopted. U.S. Department of Labor Opinion Letter 76-79 (May 25, 1976) and U.S. Department of Labor Opionion Letter 76-110 (September 28, 1976).[5] The Court of Appeals simply found that the parties in the case at bar were entering into an agreement that established the parameters of their relationship, not unlike the situation in the case of *Jervis v. Elerding*, 504 F. Supp. 606 (C.D. Cal. 1980).

Also, the Court noted that the general nature of the provisions in question were not limited to compensation for death, disability or retirement but were tied only to one factor, the amount of business in the last year prior to termination. In other words, the Court found that the purpose of the provision was to serve as a "buy-out" in which the departing agent receives payments based on what he leaves behind in the way of business for his successor. As the Court said "if a departing agent goes into competition with his successor, he is destroying the resource that would be used to pay him." 801 F.2d at 678. The Court simply held that in this particular factual situation, ERISA does not and was not intended to be applicable.

ERISA was not intended by Congress, nor does it provide by its express terms, to cover all benefits paid by an

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[5] Text of these opinion letters included in the appendix to this brief.

employer to its employees. As descriptively stated in *Murphy v. Inexco Oil*, 611 F.2d 570, at 575 (5th Cir. 1980), "its [ERISA] words are not to be read as an elastic girdle that can be stretched to cover any content that can conceivably fit within its reach." Petitioners have failed to point to any authority to show that ERISA applies to the "buy-out" provisions set forth in the agents' and agency managers' contracts.[6]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 20, 1987

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[6] Petitioners argue that the provisions of Section 201(5) of ERISA, 29 U.S.C. Section 1051(5) (1974) is the only statutory exemption from the vesting requirements for a "buy-out". This provision deals exclusively with an agreement providing payments to a retired *partner* or deceased *partner's* successor in interest. This exemption assumes the finding that there exist an employee bnefit plan for the partner. In the case at bar, the Court of Appeals found that the provisions of the contract and the benefits thereunder do not constitute an employee benefit plan, and thus the provisions of Section 1051(5) of ERISA would not apply.

APPENDIX A

Department of Labor Opinion Letter 76-79

May 25, 1976

Dear ————:

This is in response to your inquiry directed to our ———— Area Office on behalf of —— and concerning the Employee Retirement Income Security Act of 1974 (ERISA). We regret that we were unable to reply to you earlier.

In 1973, ———— entered into an agreement with his employer, ———— Theatres ————, Inc., under which he would be paid a pension benefit upon his reaching age 65. ———— was terminated from his employment on January 12, 1976, prior to being vested with any portion of his retirement benefit, and he asks whether or not the ERISA will afford him any relief.

We have concluded that the agreement between ———— and his employer is an employment contract and is not an "employee pension benefit plan" as that term is defined in the Act. Therefore, as the agreement is not subject to the requirements of the ERISA, we are not in a position to advise ———— as to what rights, if any, he might have under such agreement.

We regret our inability to be of service in this instance. We are returning herewith the copy of the agreement that was forwarded to us.

Sincerely,

APPENDIX B

Department of Labor Opinion Letter 76-110

September 28, 1976

Dear ————:

This is in response to your inquiry whether an agreement between (named), Inc., and Mr. (x), an employee and 50-percent stockholder, to provide him additional retirement compensation for past services in return for certain considerations, is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

You state that Mr. (x) is being bought out and, in addition, an individual contract was made to provide him with supplemental compensation.

Under the circumstances, the agreement is an individual contract with Mr. (x) to render specific personal services and does not constitute an employee pension benefit plan within the contemplation of section 3(2) of the ERISA.

Sincerely,